

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3

4 The United States of America,
5 Plaintiff
6 v.
7 Frank Goldstein,
8 Defendant

2:10-cr-525-JAD-PAL

**Order Denying Motion to Vacate
Sentence**

[ECF Nos. 214, 215]

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10 Federal inmate Frank Goldstein was convicted of carjacking, interference with commerce by
11 robbery under the Hobbs Act, 18 U.S.C. § 1951, and violating 18 U.S.C. § 924(c)(1)(A)(i), which
12 imposes a mandatory minimum five-year sentence enhancement for carrying, using, or possessing a
13 firearm during a crime of violence. Goldstein received 36-month, concurrent sentences for the
14 carjacking and robbery, plus an additional five years for the firearm count. Goldstein contends that
15 intervening law, particularly *Johnson v. United States*¹—in which the Supreme Court struck down
16 the residual clause of the Armed Career Criminal Act’s crime-of-violence sentencing enhancement
17 as unconstitutional— renders his § 924(c) conviction and sentence similarly invalid. Because the
18 offense that triggered Goldstein’s § 924(c) enhancement was Hobbs Act robbery, which qualifies as
19 a crime of violence under 924(c)’s force clause regardless of the continued viability of its residual
20 clause after *Johnson*, I deny his motion.

21 **Background**

22 Frank Goldstein was indicted after he carjacked a vehicle from a Bank of America drive-
23 through ATM and attempted to rob a pharmacy at gunpoint. The robbery was thwarted after
24 Goldstein was shot during a skirmish with the pharmacist. His crime spree ended abruptly when he
25 crashed the stolen vehicle during a high-speed chase by police. The four-count indictment charged
26 Goldstein with one count of carjacking, one count of interference with commerce by robbery under
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28 ¹ *Johnson v. United States*, 135 S. Ct. 2551 (2015).

1 the Hobbs Act (“Hobbs Act robbery”), and two counts of carrying a firearm during a crime of
2 violence—one specifically related to each of the predicate offenses.² Goldstein pled to the
3 carjacking, the robbery, and to carrying a firearm “during and in relation to the” Hobbs Act robbery.³
4 I accepted his guilty plea and sentenced him to 36 months per count concurrent on the carjacking and
5 robbery, plus the mandatory minimum five-year sentence required by § 924(c)(1)(A)(i) for the
6 firearm charge, for a total sentence of 96 months.⁴

7 The Hobbs Act—which was the predicate offense for Goldstein’s firearm conviction—
8 “prohibits any robbery or extortion or attempt or conspiracy to rob or extort that ‘in any way or
9 degree obstructs, delays or affects commerce or the movement of any article or commodity in
10 commerce.’”⁵ Title 18 U.S.C. § 924(c) separately criminalizes using or carrying a firearm in relation
11 to a “crime of violence” and imposes mandatory, consecutive minimum sentences. An offense may
12 qualify as a “crime of violence under Section 924(c) under either of two clauses. Section
13 924(c)(3)(A), also known as the statute’s “force clause,” includes a felony offense that “has as an
14 element the use, attempted use, or threatened use of physical force against the person or property of
15 another.” Section 924(c)(3)(B), known as the “residual clause” of the statute, encompasses any
16 felony offense “that by its nature, involves a substantial risk that physical force against the person or
17 property of another may be used in the course of committing the offense.”

18 In *Johnson v. United States*, the Supreme Court tested the constitutionality of the residual
19 clause of another subsection of § 924—§ 924(e), known as the Armed Career Criminal Act
20 (“ACCA”). Under the ACCA, “a defendant convicted of being a felon in possession of a firearm
21 faces more severe punishment if he has three or more previous convictions for a ‘violent felony,’ a
22 term defined to include any felony that ‘involves conduct that presents a serious potential risk of

24 ² ECF No. 1 (indictment).

25 ³ ECF No. 202 (plea agreement).

26 ⁴ ECF No. 212 (judgment).

27 ⁵ *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004) (quoting 18 U.S.C. § 1951(a)).
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1 physical injury to another.”⁶ The High Court evaluated the clause’s violent-felony definition using
2 the “framework known as the categorical approach,” which “assesses whether a crime qualifies as a
3 violent felony ‘in terms of how the law defines the offense and not in terms of how an individual
4 offender might have committed it on a particular occasion.’”⁷ It concluded that “the residual clause
5 produces more unpredictability and arbitrariness than the Due Process Clause tolerates,” and held it
6 void for vagueness.⁸ In *Welch v. United States*, the Court held that *Johnson* is a substantive decision
7 that is retroactive on collateral review.⁹

8 Goldstein moves to vacate his sentence under 28 U.S.C. § 2255, arguing that *Johnson* renders
9 his five-year, crime-of-violence sentence enhancement under § 924(c) unconstitutional.¹⁰ Even if I
10 were to conclude that 924(c)’s residual clause is unconstitutional under *Johnson*, Goldstein’s motion
11 fails because his Hobbs Act robbery conviction qualifies as a crime of violence under section
12 924(c)’s force clause.

13 Discussion

14 A. Hobbs Act robbery is a crime of violence.

15 Goldstein argues that Hobbs Act robbery can be committed by merely instilling “fear” in a
16 victim, so the offense cannot qualify as a crime of violence under § 924(c)’s force clause.¹¹ But the
17 Ninth Circuit confirmed as recently as last year that Hobbs Act robbery qualifies as a crime of
18 violence under section 924(c)’s force clause.¹² In *U.S. v. Howard*, the court explained in an

20 ⁶ *Johnson*, 135 S. Ct. at 2555 (quoting 18 U.S.C. § 924(e)(2)(B)).

21 ⁷ *Id.* at 2557 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)).

22 ⁸ *Id.* at 2558.

23 ⁹ *Welch v. United States*, 136 S. Ct. 1257 (2016).

24 ¹⁰ ECF No. 215.

25 ¹¹ *Id.*

26 ¹² *United States v. Howard*, 2016 WL 2961978, at *1 (9th Cir. May 23, 2016) (unpublished), as
27 amended June 24, 2016 (holding that Hobbs Act robbery qualifies as a crime of violence under 18
28 U.S.C. § 924(c) by comparing it to federal bank robbery under § 2113(a) and relying on *United*

1 unpublished decision that there is no way to commit Hobbs Act robbery without putting the victim in
2 fear of *bodily* harm—and that this sort of fear qualifies as actual or threatened physical force under §
3 924(c).¹³ I, too, recently explained at length why a conviction for Hobbs Act robbery qualifies as a
4 crime of violence under § 924(c): by “placing someone ‘in fear of injury’ to his person or property,”
5 the defendant uses the sort of “physical force” that satisfies § 924(c).¹⁴ Goldstein has not persuaded
6 me otherwise. And the Ninth Circuit and I are not outliers in this viewpoint. District courts and
7 other circuit courts—both before and after *Johnson*—overwhelmingly agree that Hobbs Act robbery
8 qualifies as a crime of violence under § 924(c)’s force clause.¹⁵

9 I thus deny Goldstein’s § 2255 motion.¹⁶ His conviction for Hobbs Act robbery
10 qualified—and still qualifies—as a crime of violence under the force clause, so Goldstein was
11 properly convicted and sentenced.

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14 *States v. Selfa*, 918 F.2d 749 (9th Cir. 1990)).

15 ¹³ *Id.* at 1–2.

16 ¹⁴ *United States v. Smith*, 2016 WL 2901661, at *4 (D. Nev. May 18, 2016) (discussion incorporated
17 herein).

18 ¹⁵ *See, e.g., U.S.A. v. Dorsey*, 2016 WL 3381218, at *2 (C.D. Cal. June 8, 2016); *United States v.*
19 *Bundy*, 2016 WL 8730142, at *24 (D. Nev. Dec. 30, 2016); *United States v. Hill*, 832 F.3d 135, 144
20 (2d Cir. 2016); *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016); *United States v. Crawford*,
21 2016 WL 320116, *3 (N.D. Ind. Jan. 27, 2016) (denying defendant’s motion to dismiss indictment
22 charging him with § 924(c) offense based on a Hobbs Act robbery); *United States v. Pena*, 2016 WL
23 690746, *8 (S.D.N.Y. Feb. 11, 2016) (same); *United States v. Coleman*, 2016 WL 1435696, *2–3
24 (N.D. Ill. Apr. 12, 2016) (same); *United States v. Williams*, 179 F. Supp. 3d 141, 144– 55 (D. Me.
25 Apr. 15, 2016) (same); *United States v. McCallister*, 2016 WL 3072237, *1 (D.D.C. May 31, 2016)
26 (same); *United States v. Barrows*, 2016 WL 4010023, *2–6 (D. Nev. July 25, 2016) (same); *United*
27 *States v. Nguyen*, 2016 WL 4479131, *2–3 (D. Kan. Aug. 25, 2016); *United States v. Davis*, 2016
28 WL 6473074, *4 (N.D. Cal. Nov. 2, 2016); *see also United States v. Evans*, ___ F.3d ___, No. 16-4094
(4th Cir. Feb. 2, 2017) (holding that federal carjacking, which can be accomplished “by force and
violence or by intimidation,” qualifies as a crime of violence under § 924(c)).

¹⁶ The parties also dispute whether Goldstein is procedurally barred from bringing this § 2255
motion and whether *Johnson* should be extended to § 924(c)’s residual clause. I need not—and do
not—reach these questions because Goldstein’s motion fails even if I assume that his challenge is
proper and *Johnson* invalidates § 924(c)’s residual clause.

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